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IN THE

UNITED STATES SUPREME COURT.

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AMANDA M. S. WHITFIELD and the STATE OF MISSOURI, *ex re*. HERBERT S. HADLEY, Attorney Gene al,

Petitioners,

vs.

AETNA LIFE INSURANCE COMPANY of Hartford, Connecticut,

Respondent.

No. [redacted] 258

PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

FRANK HAGERMAN,
Attorney for Plaintiff in Error.
HERBERT S. HADLEY,
Attorney General of the State of Missouri.

JOHN S. BOYARD, PRINTER, N. Y. LIFE BLDG., K. C., MO.

IN THE

UNITED STATES SUPREME COURT.

AMANDA M. S. WHITFIELD, and the STATE OF MISSOURI, *ex rel.* HERBERT S. HADLEY, Attorney General,

Petitioners,

vs.

AETNA LIFE INSURANCE COMPANY of Hartford, Connecticut,

Respondent.

PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioner, Amanda M. S. Whitfield, respectfully petitions this court to grant a writ of *certiorari* to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, to remove therefrom to this court for review, the record in a case there pending numbered 2013, wherein she was plaintiff in error and respondent was defendant in error, a certified copy of the record being presented herewith.

The State of Missouri, at the relation of Herbert S. Hadley, Attorney General, joins in this petition so that if and when it is granted, the state may be permitted to intervene in the interest of the public and upon behalf of thousands of policy holders who have, since 1879, taken out policies of insurance upon the faith of the validity of the law, which, as construed below, destroys the legislative policy of the state as it has existed for the past twenty-seven years, and impairs the policies so taken out. Thereupon, petitioners respectfully show:

ceased, as plaintiff, sued (Petition, Rec., 3-9) the Aetna Life Insurance Company of Hartford, Connecticut, as defendant, for five thousand dollars upon a policy of insurance (Rec., 3-8) upon the life of her deceased husband, providing for payment "if death results * * * of the principal sum of five thousand * * * dollars," but "in event of death * * * due to suicide" one-tenth thereof The company defended (Ans., Rec., 11-12) upon the sole ground that death occurred by suicide and under the terms of the policy the recovery was limited to one-tenth of the amount of insurance. A jury was waived (Stipulation, Rec., 15) and the case submitted upon an agreed statement of facts (Rec., 15-16), which was incorporated into a special finding of fact (Rec., 15-17) to the effect that the defendant, in Missouri, insured her husband, James Whitfield, who committed suicide during the life of the policy, the defendant admitting its liability, but claiming the extent of the recovery could not exceed five hundred dollars, whereas plaintiff claimed that the defendant could not legally insert in its policy a provision lessening the amount of recovery in case of suicide, because the state statute (R. S. Mo. 1889, Sec. 7896) provided that "it shall be no defense that the insured committed suicide * * * and any stipulation in the policy to the contrary shall be void." The trial court adopted the view that such limitation was valid (Judgment, Rec., 15-17; opinion, Rec., 20-24, 125 Fed. Rep., 269), which upon the plaintiff's writ of error (Rec., 1) the Circuit Court of Appeals affirmed (Rec., 38).

2. The state statute (R. S. Mo. 1899, Sec. 7896), which has been continuously in force since its first enactment in 1879 (R. S. Mo., 1879, Sec. 5982; R. S. Mo. 1889, Sec. 5855), provides:

"In all suits upon policies of insurance on life hereafter issued by any company doing business in this state, to a citizen of this state, it shall be no defense that the insured committed suicide, unless it shall be shown, to the satisfaction of the court or jury trying the cause, that the insured contemplated suicide at the time

it issued upon application for the policy and any stipulation in the policy to the contrary shall be void."

3. Both the trial (Rec., 20-24) and appellate (Rec., 27) courts held that the statute only meant that suicide could not be a complete defense, and that it was lawful for the policy to provide for a partial defense to the extent of reducing the amount of recovery in case of suicide.

4. The St. Louis Court of Appeals, after full discussion, expressly held (*Keller* v. *Travelers Insurance Co.*, 58 Mo. App., 557, 561) to the contrary. The Supreme Court of Missouri (*Logan* v. *Fidelity & Casualty Co.*, 146 Mo., 114) and several federal courts (*Berry* v. *Knights Templars*, 46 Fed. Rep., 439, 441; upon appeal, 1 C. C. A., 561, 50 Fed. Rep., 511, 512, 513; *Jarman* v. *Knights Templars Assn.*, 95 Fed. Rep., 70; upon appeal, 44 C. C. A., 93, 104 Fed. Rep., 638; upon *certiorari*, 187 U. S., 199, 47, L. Ed., 139), in upholding the statute, have held invalid provisions that in case of suicide the measure of liability should be a sum equal to the amount of premiums paid. The Circuit Court of Appeals rejected the doctrine of these cases because it was of opinion that in these latter cases there was no particular discussion of that precise point, but said that while the question was expressly decided by the St. Louis Court of Appeals, yet the opinion was not binding, because it was not from the highest court in the state, although, in that particular case, on account of the amount involved, it was the court of last resort, whose decision was so far final that a writ of error from this court would have run directly to it (*M., K. & T. R. Co.*, v. *Elliott*, 184 U. S., 530, 534, 46 L. Ed., 673).

5. The question presented is of great public interest; the enforcement of the legislative policy of the state is at stake, the validity thousands of outstanding policies involved, and if the

decision below is permitted to stand, it results in contrariety of opinion; hence, the writ of *certiorari* should issue.

AMANDA M. S. WHITFIELD,
By FRANK HAGERMAN,
Her Attorney.

STATE OF MISSOURI,
By HERBERT S. HADLEY,
Attorney General.

Received a copy of the foregoing petition for *certiorari*, and acknowledge service of notice that the same will be presented for hearing at the opening of court on April 23, 1906, or as soon thereafter as same can be heard.

_____,
Attorneys for Respondent.

BRIEF FOR PETITIONERS.

Question presented.

This is a petition for *certiorari* to the Circuit Court of Appeals of the Eighth Judicial Circuit, to have certified here a suit upon a policy of insurance for five thousand dollars upon the life of James Whitfield, who committed suicide, the courts below holding that it was lawful for the insurer to insert in its policy a provision that in case of suicide the recovery should only be for one-tenth of the insurance, notwithstanding that Sec. 7896 (Rev. Stat. of Mo. 1899), which was first enacted in 1879 (R. S. Mo. 1879, Sec. 5982; R. S. Mo. 1889, Sec. 5855), provided:

"In all suits upon policies of insurance on life hereafter issued by any company doing business in this state, to a citizen of this state, it shall be no defense that the insured committed suicide, unless it shall be shown, to the satisfaction of the court or jury trying the cause, that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void."

II.

The statute is applicable to accident insurance.

In *Logan* v. *Fidelity & Casualty Co.*, 146 Mo., 114, it was held that the section applied to an accident policy issued by an accident company, and meant that if in any form or manner there was insurance upon life, then in case of suicide there was absolute liability.

III.

There can, in case of suicide, be no limitation in the amount of the recovery.

(*a*) The decisions below were directly opposed to the cases heretofore decided in the state and federal courts. That the amount of the liability cannot, in the case of suicide, be lessened, was explicitly decided in *Kellar* v. *Travelers Ins. Co.*, 58 Mo. App., 557, 561, the syllabus thus stating the decision:

"A provision in a policy of life insurance, which reduces the amount of the insurance in case of the suicide of the insured below that otherwise contracted for, makes the suicide a defense to the extent of the reduction, and is, therefore, contrary to the statute on the subject and invalid."

Among other things, Judge Bland said:

"The fact, that the premium warranted, and the policy guaranteed, full insurance in case of the death of the insured for any cause not specified in the clause set up in the defendant's answer, demonstrates that said clause was designed to modify the liability of the insurance company if the defendant committed suicide. It necessarily follows, if this stipulation as to a decreased liability in the event of death by suicide is enforced, that it is *some* defense to the otherwise full liability agreed upon in the policy. As the statute in question declares that suicide, not committed as therein set forth, is *'no defense,'* we cannot hold that the present stipulation can be enforced without violating the plain terms of a mandatory statute which the parties have no power to alter or abrogate. We do not see the force of the analogy attempted to be drawn by the learned counsel for appellant from the validity of limitations in policies of liability for death resulting from certain special causes, alcoholism, etc., other than suicide. The statute in question does not interdict stipulations as to such other causes of death to the assured, and there is no reason therefore why they may not be the subject of agreement in policies of insurance."

The trial (Rec., 23) and appellate (Rec., 36) courts conceded that this case was precisely in point, but said it was not binding because the decision was of a court of appeals and not by a court of last resort. In cases involving, as that did, less than twenty-five hundred dollars, the decision of that court is final, this

court having held it to be so far final in that a writ of error goes directly to it (*M., K. & T. R. Co.* v. *Elliott,* 184 U. S., 530, 534, 46 L. Ed., 673). It is true that the state court of appeals must follow the last controlling decision of the supreme court; nevertheless, until that court decides otherwise, a construction of a state statute by a state court of appeals is final, if made in a cause where its jurisdiction is final, and should be binding upon the federal courts. Prior to the decision in this case, it was the generally understood doctrine of the supreme court and of the federal courts that there could be no limitation in the amount of recovery in case of suicide, because, in *Logan* v. *Fidelity & Casualty Co.,* 146 Mo., 114, and *Berry* v. *Knights Templars etc. Co.,* 46 Fed Rep., 440, upon appeal 1 C. C. A., 561; 50 Fed Rep., 511; and *Jarman* v. *Knights Templars Assn.,* 95 Fed Rep., 70; 104 Fed. Rep., 638; 187 U. S., 199, 47 L. Ed., 139; 23 Sup. Ct. Rep., 108, the policies provided (and the provision was held invalid) that in case of suicide, the company should, in lieu of paying the full amount of the insurance, pay a sum equaling the premiums that had been paid to the company, which was no more of a limitation than is attempted in this case, where the explicit provision is that where death occurs by suicide only one-tenth of the insurance shall be paid.

Logan v. *Fidelity & Casualty Co.,* 146 Mo., 114, 118, 119, 124, 126, was from the court of last resort in Missouri. Both the trial (Rec., 23) and appellate (Rec., 36) courts said that the question here presented was not there involved. In this view there was error, as a brief review of the case will show.

The policy (p. 118) in the Logan case provided:

"In case of injuries, fatal or otherwise, wantonly inflicted upon himself by the assured; or inflicted upon himself, or received by him while insane, the measure of this company's liability shall be a sum equal to the premium paid, the same being agreed upon as in full liquidation of all claims under this policy."

The answer (p. 119) there averred:

"That the assured died by reason of a pistol shot wound in-

tentionally and wantonly inflicted upon himself and by his own hand, and that the death of said assured was caused while either sane or insane, in either of which events defendant was not liable except for the amount of the premiums paid."

The trial court (p. 120) there

"Instructed the jury to return a verdict for the plaintiff for the full amount of the policy with interest. From the judgment rendered upon the verdict returned in obedience to the court's instruction, after the usual motions and preliminaries, defendant has prosecuted its appeal to this court * * * ."

The opinion (p. 126) concluded with the words "The judgment of the circuit court will be affirmed." This was an express holding that the statute rendered unenforceable a provision in the policy limiting, in case of suicide, the amount of recovery to a sum equaling the premiums paid. If such was the conclusion there reached, it is of course binding in this jurisdiction.

In the report of *Berry* v. *Knights Templars etc. Co.*, 46 Fed. Rep., 439, 441, in the trial court it does not appear what the provision of the policy was; but an examination of the original record at Kansas City, shows the provision of the policy there in question was

"Or in case of the self-destruction of the holder of this policy, whether voluntary or involuntary, sane or insane, or in case of his death resulting from any violation of the laws of any nation, state or province, or from any aerial voyage or trip; then and in each and every of the foregoing cases, this policy shall become null and void, and the widow and heirs or devisees of said member, shall have no claims for benefits on this company. Provided, that *in the case of the suicide* of the holder of this policy, then *this company will pay* to his widow and heirs or devisees *such an amount on this policy as the member shall have paid to this company on this policy in assessments on the same, without interest.*"

Upon appeal (1 C. C. A., 561; 50 Fed. Rep., 511, 512, 515) notice was taken of the fact that the policy attempted to limit the amount of recovery in case of suicide to the premiums paid, as shown by these extracts from the opinion of Judge Shiras:

"The company refused to pay the *full amount named* in the

policy, *claiming* that by the express provisions of the policy, self-destruction by the insured, whether sane or insane, rendered the contract for the payment of $5,000 void, and *the company was only bound to pay the amount which had been paid in assessments by the insured.* This action was brought in the Circuit Court for the Western District of Missouri, to recover the full sum of $5,000. The case was tried to the court, a jury being waived. * * * Judgment in favor of plaintiffs having been entered for the *full* amount of the policy, the case was brought to this court upon writ of error. * * * In our judgment, the court below ruled correctly in holding that the policy sued on was a contract made in Missouri, and, as such, that the provisions of section 5982 are applicable thereto; and therefore the judgment is affirmed, at costs of plaintiff in error."

Though the reports of the case do not show, there was probably a similar provision in the policy involved in the Jarman case, because in Judge Sanborn's dissenting opinion (104 Fed. Rep., 638, 645, 647) there was this statement:

"The parties to this suit have stipulated that the insured, 'while insane to such an extent as to be incapable of understanding the nature of consequences of his act, took his own life,' and that, if section 5855 did 'not operate against the defendant company as to this action, the defendant company is relieved from the payment of the policy aforesaid by the self-destruction of John P. Jarman,' *except to the extent of the repayment of his assessments, which amount to* $811.83. * * * The defense of the company that the insured took his own life while insane should be sustained, and the *recovery should be limited to the amount of the assessments which the insured paid to the company.*"

In that case here (187 U. S., 197, 200, 210, 47 L. Ed., 139, 143, 147) Mr. Justice Brown said that the contention of the company was that it was free

"* * * from all liability beyond that provided in the policy, 'that in the case of the suicide of the holder of this policy, then this company will pay to his widow and heirs or devisees such an amount of his policy as the member shall have paid to this company on the policy in assessments on the same, without interest.' "

His conclusion was

"The judgment of the court below awarding the plaintiff the

full amount agreed upon in the policy, without damages, is accordingly affirmed."

(*b*) *Any other construction is an evasion of the statute which under familiar rules should be avoided.*

It is manifest that if the company can contract to pay only a part of the insurance in case of suicide, the whole virtue of the statute can be destroyed, and it will not do to say, as the trial judge did, that each case must in this respect be determined by the proposition whether there was an actual evasion of the statute. The trial court, instead of following the mandate of the statute that suicide should be no defense, construed the statute to mean that suicide may be a partial, but not a complete defense to a policy of insurance.

In this way, by indirection and in a circuitous manner, the object and purpose of the statute were defeated. This ought not to be permitted if settled rules of interpretation are to be followed.

In 26 A. & E. Enc. Law (2nd Ed.), 657, it is said:

"To carry out effectually the purpose of a statute it must be so construed as to defeat all attempts to do or avoid in an indirect or circuitous manner that which it has prohibited or enjoined; courts must labor to suppress all subtle inventions and circumlocution by which the object and purpose of the law will be defeated."

In the Magdalen College Case, 11 Coke, 66, 76, speaking of a statute, the court said, it "has been always construed beneficially to prevent all inventions and evasions against the true intention of the same act."

In Endlich on Interpretation of Statutes, section 138, it is said:

"It is the duty of the judge to make such construction as shall suppress all evasions for the continuance of the mischief. To carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do or avoid, in an indirect or circuitous manner that which it has prohibited or enjoined. *In fraudem legis facit, qui, salvis, verbis legis, sententiam ejus circumvenit;* and a statute is understood as extending to all such circumventions and rendering them unavailing. *Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud.* When the acts of the parties

are adopted for the purpose of effecting a thing which is prohibited and the thing prohibited is in consequence effected, the parties have done that which they have purposely caused, though they may have done it indirectly. When the thing done is substantially that which was prohibited, it falls within the act, simply because according to the true construction of the statute, it is the thing thereby prohibited. Whenever courts see such attempts at concealment, 'they brush away the cobweb varnish' and show the transaction in its true light. They see things as ordinary men do and see through them. Whatever might be the form or color of the transaction, the law looks to the substance of it."

Innumerable instances are given by the author in sections 138-143 where this rule has been applied.

In *Philpott* v. *St. George's Hospital,* 6 H. L. Cas., 338, 349, Lord Chancellor Cranworth said:

"Prohibitory statutes prevent you from doing something which formerly it was lawful for you to do, and whenever you can find that anything done that is substantially that which is prohibited, I think it is perfecly open to the court to say that that is void, not because it comes within the spirit of the statute or tends to effect the object which the statute meant to prohibit, but because by reason of the true construction of the staute, it is the thing, or one of the things actually prohibited."

(*c*) Both the trial (Rec., 23) and appellate (Rec., 34) courts denied that the statute established any substantial public policy. In this they erred.

In *Jarman* v. *Knights Templars, etc., Co.,* 95 Fed. Rep., 70, 72, 73, Judge Philips said:

"It is *something more* than a mere declaration of the state as to its public policy. * * * This statute became a constituent element of the contract itself between the parties, constituting a part of the consideration for entering into the contract; * * * it was the same as if it had been written into the face of th policy, that * * * defendant should not *plead* thereto that the insured committed suicide."

In the same case upon appeal (104 Fed. Rep., 638, 642, 643, Judge Thayer said, "the statute was worked into the contract * * * the parties must be presumed to have agreed that the in-

surer would assume the risk of death by suicide * * * it was deemed best to exclude the defense of suicide *altogether* in such actions."

When this case reached this court (187 U. S., 197, 204) it was here said that the statute created "an independent and binding obligation * * * overriding and nullifying any stipulation of the parties." In *Aetna Life Insurance Co.* v. *Florida,* 16 C. C. A., 618; 69 Fed. Rep., 932, 935, 936, Judge Thayer said: "The general purpose of the statute was to curtail the rights of insurance companies rather than to enlarge them." In *Berry* v. *Knights Templars, etc., Co.,* 46 Fed. Rep., 439, 441, Judge Caldwell said of the statute that "its very object was to prohibit and annul such stipulations in policies, and it cannot be * * * abrogated * * * *by any device whatever*" while upon appeal (1 C. C. A., 61, 50 Fed. Rep., 511, 513) it was said "the section in question was intended to establish a general rule applicable to the business of life insurance."

In *Christian* v. *Ins. Co.,* 143 Mo., 460, 466, Judge Sherwood said:

"* * * This section also becomes part and parcel of the policy of insurance, and that policy is consequently to be read as if that section had been therein inserted."

In *Logan* v. *Fidelity & Casualty Co.,* 146 Mo., 114, 122, 123, it was said:

"The section was enacted clearly to protect all policy holders of insurance on life against the defense that the insured committed suicide * * * so that the defense of suicide now is alike unavailing to all companies issuing policies upon the life of a citizen in this state, whether they be called life, accident or assessment insurance companies."

(*d*) Both the trial (Rec., 21-22) and appellate (Rec., 35) courts erroneously held that the statute in providing that suicide should not be a defense only meant that it should not be a complete defense, because, as the trial judge said, a defense was "a general assertion that plaintiff has no cause of action," and he was re-

quired to thus construe the word "defense" because section 4160 (Rev. Stats. 1899) provided:

"The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import. * * *"

This construction was plainly repugnant to the intent of the legislature as well as to the context of the statute, hence according to the very terms of the section, should not have been adopted. There should have been applied the language the same judge used in *Jarman* v. *Knights Templars, etc., Co.*, 95 Fed. Rep., 70, 73, when he said that the policy should be construed as if there were written therein that "defendant should not *plead* thereto that the insured committed suicide;" and that used by Judge Thayer upon appeal in the same case (104 Fed. Rep., 638, 643) that the legislature "deemed best to exclude the defense of suicide *altogether* on such actions."

Section 4160 required the word "defense" to be taken in its plain or ordinary and usual sense and not in its strictly technical common law sense as was done below. The Supreme Court of Missouri held just to the contrary of the view taken below and held the words of the suicide statute must be taken in their ordinary and not in their technical sense, Judge Sherwood (*Christian* v. *Ins. Co.*, 143 Mo., 460, 469 saying:

"We have a statutory provision that in construing statutes, 'words and phrases shall be taken in their plain or ordinary and usual sense.' R. S. 1889, Sec. 6570. In a case of this sort, the statute is its own expositor. The legislature must be presumed to have intended what it has so clearly expressed, and this clause cuts off all resort to construction. Suth. Stat. Construct., Secs. 237-238."

According to all the authorities anything is a *defense* which *partially* diminishes a claim.

In 9 A. & E. Enc. Law (2d Ed.), 176, it is said:

"Although the term 'defense,' in its strictly technical sense, does not include a justification, but applies only to the denial of the complaint, *in common parlance* the word is used as applicable to any facts which defeat the action wholly or *partially*."

In a note there found (id.) this language is used:

"A *defense* is a right possessed by the defendant, arising out of facts alleged in his pleading, which wholly or *partially* defeats the plaintiff's claim. *Utah, etc., R. Co.* v. *Crawford*, 1 *Idaho*, 773. * * * "The word *defense* applies to every matter *tending to diminish* or entirely defeat the plaintiff's cause of action. *Baier* v. *Hempall*, 16 Neb., 128. A *defense* applies to all facts which defeat the action wholly or *partially*. *Kain* v. *Dickel*, 46 How. Pr. (N. Y. Super. Ct.), 208; *Stewart* v. *Travis*, 10 How. Pr. (N. Y. Supreme Ct.), 148; *Houghton* v. *Townsend*, 8 How. Pr. (N. Y. Supreme Ct.), 441; *Foland* v. *Johnson*, 16 Abb. Pr. (N. Y. Supreme Ct.), 235; *McKyring* v. *Bull*, 16 N. Y., 297; *U. S.* v. *Ordway*, 30 Fed. Rep., 32. * * * "So the term *defense* has been held to include a set-off. *Stewart* v. *Travis*, 10 How. Pr. (N. Y. Supreme Ct.), 148."

In *U. S.* v. *Ordway*, 30 Fed. Rep., 30, 32, it was said:

"The word 'defense' is a term of art. It comes from the Norman French, and was used in common-law pleading in the sense merely of denial. Rap. & L. Law Dict., 'Defense;' 1 Chitty, Pl., 462. Any new matter, then, which confesses and avoids the plaintiff's cause of action, either in whole or *in part*, and so far denies it, ought to be pleaded as a defense. *Bush* v. *Prosser*, 11 N. Y., 347; *McKyring* v. *Bull*, 16 N. Y., 297; Bliss, Pl., Sec. 327. * * * The demurrer to this defense is based on the proposition that neither good faith nor honesty of purpose is a defense to this action. * * * This defense covers at least twenty-three twenty-fourths of the damages claimed in this case, and, if established on the trial, will be a bar to the recovery thereof."

In *Baier* v. *Hempall*, 16 Neb., 128, 20 N. W. Rep., 108, the statute gave the right of appeal to one in default, who had a defense and in construing it the court said:

"The word 'defense' applies to every matter *tending to diminish* or entirely defeat the plaintiff's cause of action. This, perhaps, may be shown by cross-examination of the plaintiff's witnesses. Even if defendant has no affirmative proof to offer, he has the right

to cross-examine the witness of the adverse party, and in this way, if he can, *diminish* or defeat a recovery against himself."

The New York statute provides that an answer shall set forth any new matter constituting "a defense." In *Willis* v. *Taggart*, 6 How. Pr., 433, it was held that a plea of *partial* set-off was "clearly a *defense* as far as it goes." The doctrine was followed in *Stewart* v. *Taggart*, 10 How. Pr., 148, 151, where it was, among other things, said:

"New defense, *strictly* speaking, signifies an opposing or denial of the truth or validity of the complaint. * * * It is used in this sense by the English courts in their new rules of pleading * * * but the use of the words in these extracts 'statement of new matter constituting a defense (Sec. 149),' and 'new matter' 'constituting a defense to such new matter (Sec. 153).' must have been in the popular sense."

In *Houghton* v. *Townsend*, 8 How. Pr., 441, 442, 443, it was said:

"In common parlance the word defense is used as applicable to any facts which defeat the action, wholly or *partially*."

In *Kain* v. *Dickel*, 46 How. Pr., 208, it was said:

"Under the Code, *defenses* are to be set up by answer. * * * A defense applies to any facts which defeat the action wholly or *partially*."

In *Foland* v. *Johnson*, 16 Abb. Pr., 235, 239, it was held that "a *partial* defense may be set up by answer," and that the portion of an answer pleading in mitigation of damages constituted a defense within the meaning of the statute; the court saying that former rulings in that state to the contrary were overruled by *Bush* v. *Prosser*, 11 N. Y., 347; *McKyring* v. *Bull*, 16 N. Y., 297.

In *Bush* v. *Prosser*, 11 N. Y., 347, it was said that the Code in authorizing defense to be pleaded, recognized "the right to set up facts constituting either a total or *partial* defense to the action. * * * It is applied to matters which go to the *partial*, as well as to the total extinguishment of the plaintiff's claim, and the terms 'total' and 'partial' defense have become quite familiar and may

well be supposed to have been in the minds of the legislature when they speak of the 'grounds of defense' or 'the defenses' of a party to any action."

In *McKyring* v. *Bull*, 16 N. Y., 297, the same view was taken, the court, among other things, saying: "The word 'defense' as here used must include *partial* as well as complete defenses."

(*e*) The Circuit Court of Appeals was in error in saying that the statute should receive a restrictive construction. Such a view is directly opposed to the cases hereinbefore cited, wherein the doctrine has been repeatedly affirmed that the statute, being remedial, was to have the most liberal construction, and if this court were not bound by the decisions already rendered in the state courts, it should at least lean toward agreeing therewith. For, as said in *Burgess* v. *Seligman*, 107 U. S., 20, 27 L. Ed., 359, 365:

"But, even in such cases, for the sake of harmony, and to avoid confusion, the federal courts will lean toward an agreement of views with the state courts if the question seems to them balanced with doubt.

Respectfully submitted,

FRANK HAGERMAN,
Attorney for Plaintiff in Error.
HERBERT S. HADLEY,
Attorney General of the State of Missouri.